No. 9881

United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN THOMAS COLE and OMEGA TRICE COLE,
Appellants,

vs.

HOME OWNERS' LOAN CORPORATION, a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S PETITION FOR REHEARING

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SUBJECT INDEX

TABLE OF CASES CITED

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I. IT IS RESPECTFULLY SUBMITTED THAT THE CIRCUIT COURT HAS MISUNDERSTOOD THE STATEMENTS AND FINDINGS OF THE LOWER COURT AS CONTAINED IN ITS MEMORANDUM OPINION (Tr. p. 47) AND ORDER (Tr. p. 51)

The pertinent language of the Lower Court from which this error flows is in its memorandum opinion (Tr. 47.) as follows:

> "The Court deems $115.00 annually far below the rental value of the real estate and deems insufficient any annual rental less than $400.00 . . . . But since the debtors *evidenced lack of interest* in paying more than merely enough to cover taxes and water charges it does not appear necessary to the disposition of the property to fix the proper rental." (Italics ours)

This language is repeated substantially in the order (Tr. p. 51) with the addition that the sum of $400.00 is referred to as "reasonable."

The Lower Court specifically states the *evidence* upon which it relies at two or more places:

> "His testimony, in effect, was that there was no rental value to the property at all other than taxes and water (LLB) and that he at the present time had the complete use and possession of four similar properties by merely paying the taxes and water or less and could secure additional orchards under similar arrangements" (Tr. p. 43 bottom)
> "Under the *contentions and testimony* of the farm debtor ... ."
> (And same as preceding quotation in different language at page 46 center)

The debtors were given no chance to accept the $400.00 rental at the time of the delivery of the opinion because the Court immediately forecloses them by saying although this sum is reasonable it is not necessary to set any rental at all.

Yet the Circuit Court states in its opinion (Top p. 4):

> "The debtors' declaration that they would not pay $400 rental must be considered a waiver of *their right* to have the trial court fix the exact amount of the rental to be paid if the court found it to be over four hundred dollars." (Italics ours)

But it is clear that the first mention of the sum of $400.00 for rental appears in the trial court's memorandum. It should be kept in mind that the hearing took place on October 28, 1940. Briefs were submitted, and memorandum opinion was delivered on February 26, 1941, and the order pursuant thereto signed on April 17, 1941. If the debtors had made an outright refusal to pay $400.00 or any other sum in open court, why go to all this trouble and delay? At no point in the trial court's memorandum opinion is it stated that debtors were given a chance to affirm or deny a tentative order or proposal of the Court. On the contrary the trial court gave the debtors no opportunity to turn down or accept a definite proposition but rested its opinion on the facts referred to in the quotations *supra*. If the facts were stronger the trial would and should have mentioned them. Parenthetically it might be considered equitable that if the trial court needed to take the case under advisement to determine a reasonable rental then the debtors should be given the same privilege.

Because of the foregoing analysis the Court cannot be assisted by citing *Dombrouski v. Beu*, 114 F. 2d. 91, to the effect that the evidence not having been brought before the Higher Court it must be presumed to be suf-

ficient to support a finding of the Lower Court when, as shown, the Lower Court has stated all the facts upon which it bases its finding, although in truth it is no finding of fact at all but is an inference or conclusion. Likewise the presumption contended for as the legal principle of the Dombrouski case comes in conflict with the question of law as to whether a litigant can waive his case unknowingly from the witness stand as hereafter set forth.

The true facts of the principal case may be said of have become enlarged like the joints of a telescope, as follows:

1. One of the debtors testifies that he can get other farms of equal grade as his own for taxes and water charges and that his farm has practically no commercial value. (Tr. pp. 43 and 46)

2. The Lower Court interprets this as "evidencing lack of interest" to pay more on this home farm, and misleadingly groups in the same sentence its opinion that $400.00 rental is reasonable." (Tr. pp. 47 and 51)

3. The Circuit Court, in turn, widens the Lower Court's language by stating the debtors declared they were not interested in paying the rental which the Court determined was reasonable (Op. p. 3); and

4. Later in the same paragraph states that debtors made a declaration they would not pay the specific sum of $400.00. (Op. p. 4)

Thus, by a series of inferences, each based upon the one preceding, the final inference is a magnified distortion of the true facts. The errors are twofold:

1. The debtors are inferred to have made a *declaration* as opposed to *evidencing lack of interest.*

2. The debtors declaration or evidencing lack of interest is inferred to apply to the specific sum of $400.00.

A *declaration* implies a formal statement with reference to a specific proposition, and in a trial would usually be made by counsel on behalf of his clients.

Having evidenced lack of interest indicates a general attitude only.

Any reasoning that the debtors having lacked of interest in paying more than taxes and water charges in the sum of $115.00 (Tr. p. 47) must as a matter of logic be held to likewise not interested in paying the greater specific sum of $400.00 is fallacious because of any of the following reasons:

1. Although said $400.00 is practically four times the smaller sum yet it is a small sum in itself. The

materiality of the difference, $285.00, is not the ratio between the two figures, but must be compared to other resources of the debtors, their necessity to live some place etc. . . . The difference amounts to less than $25.00 per month.

2. The lower figure was the amount for which the litigant was contending the Court to set. Of necessity under our adversary system of law the contentions of the respective parties are wide apart and one side or the other must alter its position when the Judge decides an issue. Is there any doubt that the creditor would think $400 too low? The debtors were obligated by their mortgage to pay the creditor $88.53 per month (Tr. p. 42) which totals $1162,36 per year. If we add to this $115.00 for taxes and water the debtors total obligation was $1287.36 or three times the amount the trial court indicated was reasonable. Would the creditor be satisfied? Would the creditor lose all of his other rights in court because it contended for three times the amount the trial court thought was reasonable or because it had testimony to that effect on the witness stand?

3. The property in question was the debtors' home of twenty-two years. This undoubtedly would influence appellants or anyone else to pay a greater sum than

the commercial value of the farm, regardless of the fact that the understood purpose of the Frazier-Lemke Act in great part is to enable farmers to retain their homes by paying for the commercial not sentimental values of the same.

4. The debtor did pay the sum of $550.00 into the registry of the Court in lieu of rental as will be later set forth.

II. THE DOCTRINE OF WAIVER, AS SET FORTH IN THIS CASE, SETS A DANGEROUS PRECEDENT, AND MAY CAUSE THE COURTS OF THE UNITED STATES A GREAT DEAL OF TROUBLE FOR YEARS TO COME.

As shown by the quotations *supra* this "waiver" by the farm debtors was supposed to have occurred during the testimony of the debtor husband on the witness stand. It was not a written document or formal statement of counsel in open court. Certainly no claim can be made that counsel for the debtors formally refused on their behalf to pay the sum of $400.00 or any other sum specifically suggested. The transcript herein contains all of the written documents in the record. The minutes of the Clerk (Tr. p. 58-59) make no mention of a formal waiver in open court although these minutes do contain other minor stipulations. It

would be preposterous to believe that the testimony of any other witness could be a waiver on the farm debtors behalf.

Such a doctrine is contrary to all existing codes of justice. The essence of our law is impregnated with the principle that a citizen is entitled to notice before losing any of his rights or privileges.

But according to this doctrine, while under a strain of being on the witness stand, perhaps upon cross-examination of opposing counsel, and without knowing what is at stake, a harassed litigant can "waive" himself out of court and not know it until a year and one-half later.

It should be emphasized, that the "waiver" in question is not as to a minor point, but to the entire lawsuit. When one considers the carefulness of the Federal Courts, even in the matter of taking a default judgment against a defendant who has not responded to process or in the formal signing of orders for each step of procedure, it seems astounding that the Court would here countenance an informal "waiver" without some notice to the unfortunate litigant prior to his giving up valuable rights.

III. BY WAY OF CLIMAX APPELLANT'S WISH RESPECTFULLY BUT FORCIBLY TO CALL

ATTENTION TO THE FACT THAT WHILE THIS APPEAL WAS PENDING THE LOWER COURT SPECIFICALLY ORDERED THE FARM DEBTORS TO PAY THE SUM OF $550.00, not $400.00, INTO THE REGISTRY OF THE COURT IN LIEU OF RENTAL AND SAID SUM OF $550.00 PAID!

Appellants have requested the Clerk of the Court to certify to this fact and to file the same herewith. However, if this method of proof is not technically proper or satisfactory, it is a point that can easily be verified and should be verified so that the Court will be in the position of dispensing justice not only in theory but in fact.

IV. CONCLUSION.

It is respectfully submitted that the Frazier-Lemke Act would be a nullity if trial judges were permitted to speculate on whether or not a farm debtor could rehabilitate himself or whether or not a farm debtor will comply with an order or has waived the benefits of the act by his testimony or his contentions before the court has issued a specific order. The fundamental idea behind this legislation is to give the debtor an opportunity. It is therefore mandatory upon the trial court to set the terms of this opportunity, including the fixing of rental and a grant of possession for three years. If the debtor then fails to comply or if he then

waives his opportunity, there are prescribed remedies against him. To anticipate his action by a different unannounced procedure is to make the courts a mockery. As stated in *Wright v. Union Central Life Insurance Co.*, 311 U. S. 273, 61 Sup. Ct. 196, in the fifth paragraph thereof, which case cites *John Hancock Insurance Co. v. Bartels*, 308 U. S. 180, 84 L. Ed. 176, 60 Sup. Ct. 221, and *Kalb v. Feuerstein*, 308 U. S. 433.

> " . . . the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress, . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and letter of the Act."

Therefore Appellants respectfully urge this Court to reconsider its opinion and to reverse the decision of the District Court, with instructions to confirm the Conciliation Commissioner's Order Setting Aside Exemptions (pages 20-22 of the Transcript of Record)

CARL B. LUCKERATH,
Counsel for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN THOMAS COLE and OMEGA TRICE COLE, *Appellants,* - vs - HOME OWNERS' LOAN CORPORATION, a corporation, *Appellee.*	No. 9881 CERTIFICATION

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON } ss.

I, CARL B. LUCKERATH, attorney of record for JOHN THOMAS COLE and OMEGA TRICE COLE, appellants in above entitled case, do hereby certify that the Petition for Rehearing contained herein is not made for the purpose of delay, but is made in good faith, both by said appellants and their attorneys.

Witness my hand and seal this 11th day of July, 1942.

CARL B. LUCKERATH
By ALECDUFF